SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

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NORA ARTHUR,

Plaintiff,

- v -

1809-15 7TH AVENUE HOUSING DEVELOPMENT FUND CORPORATION, MICHAEL MASCHCIO, CARVER FEDERAL SAVINGS BANK, WATERFALL VICTORIA MASTER FUND LTD., WATERFALL VICTORIA REO 2013-01, LLC,JOHN DOE, JANE DOE, XYZ CORPORATION I, XYZ CORPORATION II,

Defendants.

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INDEX NO. 653800/2015

MOTION DATE 10/13/2020, 10/13/2020, 10/13/2020

MOTION SEQ. NO. 011 012 013

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 011) 354, 355, 356, 357, 358, 359, 360, 361, 362, 404, 430, 431, 432, 433, 434, 446, 449

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 403, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 447, 451

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 402, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 448, 450

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Plaintiff Nora Arthur, commenced this action to obtain redress for allegedly unlawful eviction proceedings brought by defendants 1809-15 7th Avenue Housing Development Fund Corporation (the HDFC) and Michael Maschcio (collectively the Co-op Defendants) based on non-payment of maintenance fees and against defendants Carver Federal Savings Bank, Waterfall Victoria Master Fund Ltd., Waterfall Victoria REO 2013-01, Statebridge Company, LLC (Statebridge) (collectively the Lender Defendants) for an allegedly invalid June 4, 2014 foreclosure and sale.

In motion sequence no. 11, the Co-op Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them, for summary judgment on their counterclaims, and for an order lifting the stay of eviction proceedings or for use and occupancy.

In motion sequence no. 12, the Lender Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them.

Plaintiff opposes both motions and, in motion sequence no. 13, moves for summary judgment against the Lender Defendants on her twelfth, thirteenth and fifteenth causes of action.

The motions are consolidated for disposition.

Background

Plaintiff is, or was, the tenant and shareholder of apartment 4F in a residential cooperative apartment building located at 1809-15 7th Avenue, New York, New York 10026 (the Building) (NY St Cts Elec Filing [NYSCEF] Doc No. 357, Cara A. O'Sullivan [O'Sullivan] affirmation, exhibit A [amended complaint], ¶¶ 1-2 and 10). Plaintiff currently resides in a nursing facility (NYSCEF Doc No. 430, plaintiff mem of law at 17). Her granddaughter, Kay Hunt (Hunt), has purportedly lived in the apartment since June 2018 (NYSCEF Doc No. 360, O'Sullivan affirmation, exhibit D [Maschio 9/16/19 aff], ¶¶ 4-8).

A. Plaintiff's Tenancy at the Building

Plaintiff moved into apartment 4F as a rental tenant in 1990 (NYSCEF Doc No. 366, plaintiff 11/22/15 aff, ¶ 3). At that time, nonparty City of New York (the City) owned the Building (*id.*, ¶ 5). On June 4, 2004, the City transferred title to the Building to the HDFC, a newly formed housing development fund cooperative corporation (*id.*, ¶¶ 4-5). On June 28, 2004, the HDFC, as "owner," and the City, through the Department of Housing Preservation and Development (HPD), entered into a 30-year regulatory agreement (the Regulatory Agreement)

whereby the HDFC agreed to allow HPD oversight over its operations and to abide by certain regulations on management and ownership of the Building (NYSCEF Doc No. 367, Belinda Luu [Luu] affirmation, exhibit 1 at 3).

On September 13, 2004, plaintiff acquired 250 shares of capital stock in the HDFC (NYSCEF Doc No. 366, ¶ 6). That same date, plaintiff, as "Shareholder" or "Lessee," and the HDFC, as "Corporation" or "Lessor," executed a proprietary lease for apartment 4F (NYSCEF Doc No. 368, Luu affirmation, exhibit 2 [the Proprietary Lease] at 1). Article V of the Proprietary Lease outlines a lessee's rights and duties. Section 5.01 (a) provides that a lessee may "quietly have, hold and enjoy the Apartment without any suit, trouble or hindrance from the Corporation," provided that the lessee has paid the maintenance charge and has complied with all provisions in the lease (*id.* at 7). Under Section 1.1 (a), a maintenance charge, or rent, shall be paid to the HDFC in equal installments on the first of each month (*id.* at 1). In the event monthly maintenance has not been paid, then "the Shareholder shall pay interest thereon … and such interest shall be deemed an additional maintenance charge hereunder" (*id.* at 8 [Section 5.02 (a)]). Section 5.02 (b) also states that a lessee shall comply with the House Rules adopted by the HDFC, and that a breach constitutes a default on the Proprietary Lease (*id.*). The House Rules provide in pertinent part that:

> "(1) The public halls and stairways of the building shall not be obstructed or used for any purpose other than an entrance to and exit from the apartments in the building, and the fire escapes shall not be obstructed in any way.
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> …
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> (4) No article shall be placed in the halls or on the staircase landings or fire towers, nor shall anything be hung or shaken from the doors, windows, terraces or balconies or placed upon the windowsills of the buildings"

(*id.* at 29).

Sections 7.01 (d) and (e) of the Proprietary Lease provide that a default over two months in paying maintenance, additional maintenance or special assessments or a default for 30 days in the performance of any other lease provision apart from paying maintenance may result in termination of the Proprietary Lease (NYSCEF Doc No. 368 at 35). Section 7.02 (a) (i) partially states that "[i]f the Corporation resumes possession of the Apartment, either by summary proceedings, action of ejectment or otherwise, because of default by the Shareholder in the payment of any maintenance charge, additional maintenance charge or … payment due hereunder …, Shareholder shall continue to remain liable for the payment of a sum equal to the maintenance charge … which would have become due hereunder …" (*id.* at 22). In the event of a default by a lessee, Section 6.01 (c) permits the HDFC to recover its reasonable attorneys' fees and reads, in part:

> "If the Shareholder shall at any time be in default under this lease and the Corporation shall incur any expense (whether paid or not) in performing acts which the Shareholder is required to perform or in beginning any lawsuit or proceeding based on such default or defending or asserting a counterclaim in any action or proceeding brought by the Shareholder, said expense including reasonable attorney's fees and disbursements, shall be paid by the Shareholder to the Corporation, on demand, as additional maintenance charges"

(*id.* at 16).

Section 5.05 of the Proprietary Lease restricts actions a lessee may take regarding his or her shares. Section 5.05 (c) (i) states that the "lease and the related Shares may be pledged or assigned as security for a construction or rehabilitation loan made to the Shareholder by a bank … without violating this lease; but during the Resale Period (as defined in Section 2.01) any pledge of or security interest in this lease and the related shares shall be subject to a lien in favor of the Corporation" (NYSCEF Doc No. 368 at 14). Section 5.05 (c) (iii) further states that "[d]uring the Resale Period, this lease and the Shares allocated to the Apartment may not be

pledged or assigned as security for a home equity loan" (*id.*). As to the "Resale Period", Section 2.01, entitled "Lien of City and Corporation," states, in part:

> "The Building is encumbered for a period of thirty (30) years from the date of the Regulatory Agreement title to the Building is transferred by the City of New York ('City') to the Corporation ('Restriction Period'). During the resale period the prior written approval of the Commissioner of HPD must be obtained before the building can be sold or mortgaged"

(*id.* at 3).

Plaintiff previously served as a member of the HDFC's board (the Board) (NYSCEF Doc No. 366, ¶ 16). Maschio served as the Board's treasurer from February 8, 2012 to December 1, 2015 and currently serves as its president (NYSCEF Doc No. 359, O'Sullivan affirmation, exhibit D [Maschio 1/5/16 aff], ¶ 2).

B. The Loan from Carver

On September 24, 2007, plaintiff executed an adjustable rate note in the principal amount of $231,000 in favor of Carver[1] (NYSCEF Doc No. 369, Luu affirmation, exhibit 3 [the Note] at 1). Plaintiff agreed to repay the principal with interest in monthly installments (*id.*). The Note provides that the failure to pay an installment when due may result in a 5% late charge (*id.* at 2 [Section 7 (A)]). In the event the full amount of an installment has not been paid, Carver or any Note holder may send plaintiff a written notice informing her of the default and demanding immediate payment of the full amount of the principal with interest, costs and expenses incurred in enforcing the Note (*id.* at 2-3 [Section 7 (B) and (C)]).

Plaintiff also executed a loan security agreement in which she pledged all her right, title and interest in her 250 shares of capital stock and in the Proprietary Lease to Carver as security

[1] Plaintiff avers that she obtained the loan in 2005 to pay off existing debt (NYSCEF Doc No. 361, plaintiff 10/25/16 ¶ 20).

(NYSCEF Doc No. 370, Luu affirmation, exhibit 4 [the Security Agreement] at 1). Under Section 20 of the Security Agreement, entitled USE OF THE MONEY LOANED TO ME," plaintiff agreed to comply with the Lien Law "by using any money I receive from you for the purpose of paying the cost of any improvements made to the Apartment or otherwise with respect to the Security before I use any of the money for any other purpose" (*id.* at 7). She also agreed to pay "all maintenance fees … and any other charges imposed by [THE THE HDFC]" (*id.* at 3 [Section 9]). Section 15 outlines the numerous events that constitute defaults on the Security Agreement, such as a failure to pay the money due on the Note and the Security Agreement (*id.* at 5 [Section 15 (A) (i)]). In the event of a default, Carver may choose to accelerate payment of the entire debt (*id.* at 6 [Section 16]). If the full amount is not paid, then Carver has "the right to sell the Security at a public or private sale" (*id.* [Section 17 (A)]).

C. The Eviction Proceedings

In 2012 or 2013, plaintiff fell behind on the maintenance due to the HDFC (NYSCEF Doc No. 366, ¶ 15). In July 2013, the HDFC initiated a non-payment proceeding against her captioned *1809-15 7th Avenue HDFC v Arthur*, Civ Ct, NY County, L&T index No. 72274/2013 (the 2013 Action) (NYSCEF Doc No. 357, ¶ 54; NYSCEF Doc No. 359 at 47). On September 10, 2013, plaintiff, represented by The Legal Aid Society (Legal Aid), entered into a stipulation of settlement, which states, in pertinent part, that:

> "Respondent acknowledges $5108.71 owed to date and consent to a final judgment of possession & a warrant of eviction, issuance forthwith stayed to 10/22/13 for payment of $5,108.71 plus Oct 2013 maintenance ($625.30 per mo) upon default all sums shall become immediately due warrant shall execute upon service of marshals notice & Petitioner may seek all additional maintenance due. All payments first applied to current maintenance"

(NYSCEF Doc No 359 at 47 and 55; NYSCEF Doc No. 357, ¶ 56). Plaintiff then submitted an application for financial assistance to New York State's Family Eviction Prevent Supplement Program, or FEPS (NYSCEF Doc 366, ¶ 17). By letter dated October 18, 2013, Legal Aid was advised that the FEPS application for $5,309.51 had been granted (NYSCEF Doc No. 434, Luu affirmation, exhibit D at 1). In light of the FEPS grant, plaintiff moved to stay the eviction (NYSCEF Doc No. 359 at 53). In an affirmation in support of the motion, plaintiff's counsel wrote that plaintiff "informs me that she and her minor child would have nowhere else to live if they are evicted from this apartment" (*id.* at 56).

Plaintiff avers that after she filed the motion for a stay, Maschio "embarked on a plan … to block the disbursement of the FEPS grant" (NYSCEF Doc No. 366, ¶ 17). Maschio allegedly told plaintiff that he had reported her to the New York City Department of Social Services (DSS) because "he 'had a fiduciary duty to report any fraudulent activities and information that I had used to secure the grant funds'" (*id.*). An unnamed case manager informed plaintiff that DSS had been told she "owned properties outside the State of New York, and cars and a boat and other luxury items'" (*id.*, ¶ 19). Plaintiff claims Maschio told her he had informed Carver that she was delinquent on her maintenance and urged Carver to take possession of the apartment (*id.*). Maschio is also alleged to have reported to plaintiff's insurance carrier that she no longer owned shares in the HDFC (*id.*).

By decision and order dated February 24, 2014, the court (Cohen, J.) stayed the eviction pending interim payment of the outstanding arrears of $8,235.51 due to the HDFC through February 28, 2014, and adjourned the proceeding to April 10, 2014 for a legal fees hearing (NYSCEF Doc No. 359 at 71). On March 7, 2014, Legal Aid moved to withdraw as plaintiff's counsel (*id.* at 73). Counsel's affirmation in support reads, in part, that plaintiff's "welfare case

[with DSS] was closed due to allegations of excess resources" (*id.* at 75). On March 17, 2014, the court (Spears, J.) granted Legal Aid's motion to withdraw, noted that plaintiff owed $8,860.81 in arrears "but shows no ability to pay," vacated all stays, and directed the Marshal to notify Adult Protective Services (APS) before scheduling an eviction (*id.* at 80).

Plaintiff alleges that in April 2014, Marshal Alfred E. Locascio attempted to evict her from the apartment even though APS had not conducted an evaluation (NYSCEF Doc No. 366, ¶¶ 24-25). She states that APS told her it had not performed an evaluation "because the Marshall [sic] had called APS and told them that I was alright" (*id.*, ¶ 25). She maintains that the HDFC's then-president "apparently took the day off from work and had hired, either individually or in his capacity as board president, a crew of six men, a dumpster and a big truck with the words 'YOU GOT JUNK' sprawled across it" (*id.*, ¶ 24). That same month, plaintiff secured $9,486.11 in financial assistance from DSS (NYSCEF Doc No. 359 at 82), and in May 2014, DSS disbursed $9,485.94 to the HDFC (*id.*, ¶ 23). The 2013 Action then settled (*id.*).

After plaintiff failed to appear for the fee hearing on May 20, 2014, the court (Spears, J.) awarded the HDFC a monetary judgment for $7,651.50 (NYSCEF Doc No. 359 at 85). On December 17, 2014, the court (Kraus, J.) denied plaintiff's motion to vacate the judgment (*id.* at 90).

Plaintiff claims that a second eviction proceeding brought by THE THE HDFC against her in 2014 (the 2014 Action) was dismissed as abandoned (NYSCEF Doc No. 357, ¶¶ 98 and 100).

In January 2015, the HDFC commenced a third non-payment proceeding captioned *1809-15 7th Avenue HDFC v Carver Federal Savings Bank*, Civ Ct, NY County, L&T index No. 52315/2015 (the 2015 Action) and named Carver as "Respondent-Proprietary Lessee" and

plaintiff as "Respondent-Undertenant" (NYSCEF Doc No. 371, Luu affirmation, exhibit 5 at 1). The petition alleged that Carver was the successor-in-interest to plaintiff, who was the former shareholder of the apartment (*id.* at 3), and that $13,251.75 was due in maintenance and storage fees (*id.* at 4). Plaintiff alleges that she was unaware that her shares had been sold, as discussed further *infra*. By decision and order dated November 23, 2015 (Saxe, J.) the court found, in part, that "Respondent, Waterfall Victoria Reo 2013-01 LLC has failed to appear and therefore a final default judgment is hereby entered against 'Waterfall' for $13,251.75; warrant to issue forthwith, execution stayed 5 days, and a possessory judgment only against the undertenant sued herein as Nora Joyce Arthur" (NYSCEF Doc No. 372, Luu affirmation, exhibit 6 at 1).

D. The Alleged Harassment

Plaintiff complains that she is the victim of harassment on the part of the HDFC. She cites the baseless eviction proceedings as evidence (NYSCEF Doc No. 366, ¶¶ 12 and 15). She maintains that the HDFC ignored her complaints of water damage, a rodent infestation, and "failing" windows in the apartment, which forced her to seek recourse in Housing Court (*id.*, ¶¶ 22 and 40-41). In addition, the HDFC levied fines against her based on "false violation reports of my smoking, garbage violations and the like"; those fines precipitated the commencement of the 2015 Action (*id.*, ¶ 39).

D. The Foreclosure Proceedings

Plaintiff avers that she regularly paid the monthly installments due on the Note until 2012 or 2013, when problems with her health prevented her from working and caused her to fall behind (NYSCEF Doc No. 366, ¶¶ 46-47). Correspondence on Carver letterhead from its loan servicer, nonparty Dovenmuehle Mortgage, Inc. (DMI), to plaintiff shows that she was delinquent in meeting her monthly payments as early as December 2, 2011 (NYSCEF Doc No.

395, Alan F. Kaufman [Kaufman], exhibit C [Scott Burris (Burris) aff], at 6). A December 13, 2012 letter from Carver states that the November and December installments were past due (*id.* at 16). A December 14, 2012 letter states that plaintiff could cure the default by paying $2,595.92 before March 14, 2013 (*id.* at 20). On April 2, 2013, Carver sent plaintiff a notice of default apprising her that she was in default on her payment obligations and stating that she could cure the default by paying $4,042 in certified funds within 35 days of the date of the letter (NYSCEF Doc No. 375, Luu affirmation, exhibit 9 at 1). The notice advised plaintiff that the failure to cure could result in the immediate acceleration of the principal and a sale of the apartment (*id.*). On October 10, 2013, Carver informed plaintiff that her file had been forwarded to nonparty law firm McCabe, Weisberg & Conway P.C. (McCabe), to commence a foreclosure proceeding (NYSCEF Doc No. 395 at 29).

Plaintiff avers that she attempted to bring the loan current in late 2013 by paying $8,853.00 to Carver (NYSCEF Doc No. 366, ¶ 50). Carver responded by returning her check for $5,000 on December 3, 2013 (NYSCEF Doc No. 380, Luu affirmation, exhibit 14 at 1). Carver indicated that the funds were "not sufficient" to reinstate the account, and repeated that the account had been referred to McCabe on October 11, 2013 to initiate foreclosure proceedings (*id.*).

Shortly thereafter, Carver, through DMI, mailed plaintiff a notice dated December 20, 2013 advising her that she was in danger of losing her home (NYSCEF Doc No. 385, Luu affirmation, exhibit 19 [the 90-Day Notice] at 1). Burris, an assistant vice president at DMI, adds that the notice was printed in bold, 14-point font on colored paper (NYSCEF Doc No. 395, ¶¶ 1 and 8). By letter dated December 23, 2013, McCabe informed plaintiff that she could

reinstate her loan by sending a certified check, tellers check or money order made payable to DMI in the amount of $16,397.74 (NYSCEF Doc No. 376, Luu affirmation, exhibit 10 at 1).

On March 7, 2014, Carver sold the Note, Security Agreement and other loan documents to Waterfall Fund, and executed and delivered a written assignment of the loan documents (NYSCEF Doc No. 387, Luu affirmation, exhibit 21 [James A. Raborn (Raborn) aff], ¶¶ 9-10). On March 7, 2014, Carver informed plaintiff that "ownership and servicing" of her loan had been assigned and transferred,and identified Statebridge as the new loan servicer (NYSCEF Doc No. 377, Luu affirmation, exhibit 11 at 1). On May 16, 2014, Waterfall Fund filed a UCC Financing Statement naming it as the new secured party in the Office of the City Register (NYSCEF Doc No. 378, Luu affirmation, exhibit 12 at 1-3).

On April 27, 2014, plaintiff received a "welcome" letter from Statebridge inviting her to contact it if she was in default on the loan (NYSCEF Doc No. 366, ¶¶ 52-53). Plaintiff states that she immediately contacted Statebridge and told servicing specialist Jamie Worthington (Worthington) that she would like to pay $8,853 (*id.*, ¶ 54). Plaintiff claims she asked Worthington for reinstatement figures and a payment plan (*id.*). Worthington allegedly offered plaintiff a payment plan which increased her installments to $2,000 on the condition that she make an initial payment totaling one-third of the arrears, or $8,000, together with the current installment due (*id.*, ¶¶ 55-56). Plaintiff states that Worthington told her he could not formalize their agreement because the loan servicer had changed to "Waterfall Victoria" (*id.*, ¶ 58). Plaintiff further claims that her subsequent inquiries about the payment plan were routed to a paralegal at McCabe, who never responded with any information (*id.*, ¶¶ 61-62).

Meanwhile, McCabe continued to pursue foreclosure on Carver's behalf. By letter dated April 8, 2014, McCabe informed plaintiff that "Caver [sic] Federal Savings Bank has declared

the loan in default and has authorized the sale of the above stock it holds as security" (NYSCEF Doc No. 379, Luu affirmation, exhibit 13 at 1). The letter informed plaintiff that the public sale of her 250 shares of capital stock and her interest in the Proprietary Lease would take place at 12:30 p.m. on June 4, 2014 at 60 Centre Street (*id.*). On May 5, 2014, McCabe mailed plaintiff a notice of sale (NYSCEF Doc No. 381, Luu affirmation, exhibit 15 [the Notice of Sale] at 1). McCabe also caused the Notice of Sale to be published in the Daily News on May 5, 12 and 19, 2014 (NYSCEF Doc No. 398, Kaufman affirmation, exhibit F [Mark Golab (Golab) affirmation] at 25).

Carver purchased the secured "collateral" at the June 2014 auction. Plaintiff and the Lender Defendants, though, proffer different versions of the "Terms of Sale with Memorandum of Sale" and "Certificate of Sale and of Fact." The Lender Defendants' documents show a high bid of $308,000 (NYSCEF Doc No. 398 at 28-29). The same documents presented by plaintiff reflect a high bid of $380,000 (NYSCEF Doc No. 383, Luu affirmation, exhibit 17 at 1 and 3).

In an "Assignment of Bid" dated September 26, 2014, Carver, misidentified as "Caver," assigned its right, title and interest in its bid at the June 4, 2014 foreclosure sale and the "Terms of Sale and the Judgment of Foreclosure and Sale" to REO (NYSCEF Doc No. 366, ¶ 73). In October 2014, plaintiff received a "Ten Day Notice to Quit" informing her that REO may commence a proceeding to remove her from the apartment unless she vacated it by October 21, 2014 (*id.*, ¶ 72). Plaintiff avers that in April 2015, people began arriving at the apartment for an "open house" scheduled by an unknown party (*id.*, ¶¶ 37-38). She continues to receive bills from Statebridge (*id.*, ¶ 72; NYSCEF Doc No. 373, Luu affirmation, exhibit 7 at 1). Plaintiff has also received a notice identifying nonparty Specialized Loan Service LLC as a new loan servicer (NYSCEF Doc No. 374, Luu affirmation, exhibit 8 at 1).

Procedural History

Plaintiff commenced this action by filing a summons and complaint on November 18, 2015. The amended complaint pleads fifteen causes of action. The first five assert claims for harassment against the HDFC. The sixth and seventh causes of action plead prima facie tort against the HDFC and Maschio, respectively. The eighth pleads a claim for breach of fiduciary duty against the HDFC. The ninth and tenth causes of action assert claims for breach of the Regulatory Agreement and for breach of the Proprietary Lease against the HDFC. The eleventh cause of action pleads abuse of process against all defendants. The twelfth seeks a judgment declaring that the 90-Day Notice purportedly sent by Carver fails to comply with UCC 9-611. The thirteenth cause of action pleads a violation of UCC 9-613 against Carver. The fourteenth cause of action pleads a claim for breach of the implied covenant of good faith and fair dealing against the Lender Defendants. The fifteenth alleges a violation of General Business Law § 349 against the Lender Defendants. The amended complaint includes a printout on "the HDFC Cooperatives," a copy of the Regulatory Agreement recorded in the Office of the City Register on July 29, 2004, and a copy of the Proprietary Lease as exhibits (NYSCEF Doc Nos. 2-3).

In their answer, the Co-op Defendants interposed three counterclaims for (1) breach of contract based on the Proprietary Lease; (2) recovery of their reasonable attorneys' fees; and, (3) monetary sanction under Uniform Rules for Trial Courts (22 NYCRR) 130-1.1 (a). In lieu of answering, the Lender Defendants moved for dismissal of the eleventh through fifteenth causes of action against them. The court (Wright, J.) granted the motion. The twelfth, thirteenth and fifteenth causes of action were reinstated on appeal (*see Arthur v Carver Fed. Sav. Bank*, 150 AD3d 447, 448 [1st Dept 2017]).

By decision and order dated July 8, 2017, the court (Edwards, J.) enjoined the Co-op Defendants from taking any steps to evict plaintiff from the apartment pending a determination in this action, and conditioned the stay upon plaintiff paying a $15,000 undertaking, to be deposited into an escrow account maintained by her attorney (NYSCEF Doc No. 173). This court subsequently appointed a guardian ad litem for the limited purposes of assisting in the collection of documents and reviewing the terms of any proposed final settlement of plaintiff's claims (NYSCEF Doc No. 342). Plaintiff filed a note of issue on June 5, 2020 (NYSCEF Doc No. 352).

The Co-op Defendants and the Lender Defendants now move separately for summary judgment in their favor. Plaintiff opposes and moves for summary judgment on her claims against the Lender Defendants.

Discussion

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]).

The HDFC and Maschio's Summary Judgement Motion (MS No. 11)

A. The First through Fifth Causes of Action for Harassment

The first five causes of action for harassment are predicated on the HDFC's: use of force to induce plaintiff to vacate the apartment (first cause of action); course of conduct in interfering with plaintiff's use and occupancy by interrupting or discontinuing essential services (second cause of action); threat to remove plaintiff's possessions by encouraging the Marshal to execute the warrant of eviction without complying with the Housing Court's April 24, 2014 order (third cause of action); frivolous conduct in prolonging the 2013 Action (fourth cause of action); and, frivolous conduct meant to maliciously injure her (fifth cause of action) (NYSCEF Doc No. 357, ¶¶ 151-169). The complaint alleges that the "spurious" Housing Court actions constitute "harassment" under Administrative Code of the City of New York § 26-521[2] (*id.*, ¶ 14).

New York does not recognize a common-law cause of action for civil harassment, unless a remedy for harassment is derived from statute (*see Jerulee Co. v Sanchez*, 43 AD3d 328, 329 [1st Dept 2007], *lv denied* 9 NY3d 815 [2007]). Here, the Co-op Defendants have established that Administrative Code § 26-521 is inapplicable. Administrative Code § 26-521 (a) prohibits an owner from unlawfully evicting a person lawfully occupying a dwelling for more 30 days by using force or by engaging in conduct that interferes with that person's use and occupancy or prevents that person from lawfully occupying the dwelling, "except to the extent permitted by law pursuant to a warrant of eviction or other order of a court of competent jurisdiction or a governmental vacate order." In effect, the statute bars an owner from engaging "in an unlawful eviction instead of commencing summary proceedings" (*Facey v Johnson*, 49 Misc 3d 1136, 1139 [Civ Ct, Kings County 2015]). In this case, the Co-op Defendants have demonstrated that the HDFC commenced two lawful summary proceedings which resulted in warrants of eviction (*see Eze v Spring Cr. Gardens*, 85 AD3d 1102, 1103 [2d Dept 2011], *lv denied* 18 NY3d 804

[2] The complaint mistakenly refers to Administrative Code § 26-512, which discusses rent stabilization. Plaintiff is not a rent-stabilized tenant.

[2012] [granting summary judgment to the defendants and dismissing the plaintiff's claim for wrongful eviction under Administrative Code § 26-521 (a)]).

In opposition, plaintiff does not address whether Administrative Code § 26-521 is a proper predicate for the harassment claims and raises a violation of Administrative Code § 27-2005 (d) for the first time. Thus, plaintiff has abandoned her claims based on Administrative Code § 27- 521 (*see Ng v NYU Langone Med. Ctr.*, 157 AD3d 549, 550 [1st Dept 2018]).

The Co-op Defendants, in response, argue that plaintiff did not plead Administrative Code § 27-2005 (d) in her complaint. Generally, "'[a] court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint'" (*Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012 [internal citation omitted]; *Abreu v Stratford Realty Assoc.*, 208 AD2d 465, 465 [1st Dept 1994] [rejecting the plaintiff's presentation of an entirely new theory of liability because of the "considerable prejudice" to the defendant]). But because plaintiff has not raised a new theory of liability since this section of the Administrative Code also prohibits harassment, her reliance on the un-pleaded section of the Administrative Code is permissible (*see Herrera v Vargas*, 183 AD3d 542, 543 [1st Dept 2020]). In any event, the Co-op Defendants have not demonstrated any prejudice since they addressed the merits in their reply.

Administrative Code § 27-2005 (d) provides that "[t]he owner of a dwelling shall not harass any tenants or persons lawfully entitled to occupancy of such dwelling as set forth in paragraph 48 of subdivision a of section 27-2004 of this chapter" (*see also Aguaiza v Vantage Props., LLC*, 69 AD3d 422, 423 [1st Dept 2010] [stating that the statute is meant to protect tenants from harassment]). Administrative Code § 27-2004 (a), defines harassment as:

> "48. Except where otherwise provided, the term 'harassment' shall mean any act or omission by or on behalf of an owner that (i)

> causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, and (ii) includes one or more of the following acts or omissions, provided that there shall be a rebuttable presumption that such acts or omissions were intended to cause such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, except that such presumption shall not apply to such acts or omissions with respect to a private dwelling, as defined in paragraph six of subdivision a of section 27-2004:
>
> . . .
>
> b. repeated interruptions or discontinuances of essential services, or an interruption or discontinuance of an essential service for an extended duration or of such significance as to substantially impair the habitability of such dwelling unit;
>
> . . .
>
> d. commencing repeated baseless or frivolous court proceedings against any person lawfully entitled to occupancy of such dwelling unit;
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> . . .
>
> g. other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of such dwelling unit and that cause or are intended to cause such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy ...."

A violation of Administrative Code § 27-2005 (d) subjects an owner to a civil penalty of not less than $2,000 and not more than $10,000 (*see* Administrative Code § 27-2115 [m] [2]).

Preliminarily, "using force against, or making express or implied threats that force will be used" qualifies as harassment under Administrative Code § 27-2004 (a) (48) (a). Notably, plaintiff does not cite this provision, even though the first cause of action alleges that the HDFC used or threatened to use force (NYSCEF Doc No. 357, ¶ 152). The record, though, does not demonstrate that the HDFC threatened to use or engaged in any use of force. Accordingly, the first cause of action will be dismissed.

The fourth cause of action alleges that the HDFC delayed resolution of the 2013 Action, but Administrative Code § 27-2004 (a) (48) (d) deals with "commencing repeated baseless or frivolous court proceedings." Here, plaintiff fails to raise a triable issue of fact that the HDFC commenced baseless proceedings against her. Significantly, plaintiff admitted in the verified complaint that she had not paid the maintenance due before the HDFC brought the 2013 Action (NYSCEF Doc No. 357, ¶ 55). Plaintiff's statement constitutes a judicial admission (*see Matter of Allstate Ins. Co. v Rosado*, 137 AD3d 662, 662 [1st Dept 2016]). Furthermore, while plaintiff complains that the 2015 Action sought to recover legal fees (NYSCEF Doc No. 357, ¶ 101), Section 6.01 (c) of the Proprietary Lease expressly allows the HDFC to recover its legal fees as additional maintenance.

The Co-op Defendants have also demonstrated that plaintiff was delinquent in paying monthly maintenance and that she violated the House Rules banning the storage of personal items in the hallway. A ledger furnished by the HDFC's property manager, nonparty Finger Management Corp. (FMC), shows that plaintiff had accrued $1,121.20 in unpaid maintenance as of August 1, 2014 and $175.00 in fines for the House Rules violations (NYSCEF Doc No. 359 at 92-96). FMC had previously advised plaintiff of the violations by letter on December 2, 2013, requested that she remove the items, and informed her that they would be removed and discarded if she refused (*id.* at 112). FMC sent plaintiff another letter on January 17, 2014 advising her that she had violated the House Rules by storing her personal items in the hallways (*id.* at 121). FMC notified plaintiff on October 17, 2014 and December 4, 2014 of two more violations for storing items in the hallway (*id.* at 126-127). Still images taken from surveillance video depicting the hallway outside of plaintiff's apartment on January 16, 2014 and November 11, 12 and 18, 2014 show plaintiff moving about items stored in that hallway (*id.* at 114-118). By letter

dated January 17, 2014, FMC informed plaintiff that it had received a complaint about plaintiff or her guest improperly disposing of trash, and informed plaintiff that a $25 fine would be assessed for every violation (*id.* at 120). Between January 21, 2014 and March 26, 2014, FMC sent plaintiff four more letters about her improper disposal of garbage and imposed fines for each incident (*id.* at 122-125). Though plaintiff describes the violations as "false" (NYSCEF Doc No. 366, ¶ 39), she has not challenged the evidence presented by the Co-op Defendants. Moreover, plaintiff has not presented any proof that she or Carver as her successor-in-interest were current on the maintenance charges when the HDFC commenced the 2015 Action. Thus, she has failed to raise a material issue whether the Housing Court actions were frivolous so as to constitute harassment under Administrative Code § 27-2004 (a) (48) (d). Accordingly, the fourth cause of action will be dismissed.

The fifth cause of action pleads "frivolous conduct" but fails to describe the specific acts constituting the alleged harassment. Accordingly, since Administrative Code § 27-2004 (a) (48) does not define general "frivolous conduct" as harassment, the fifth cause of action will be dismissed.

The second cause of action alleges that the HDFC interrupted or discontinued essential services. Administrative Code § 27-2004 (a) (48) (b) does not define the term "essential services," and so "[t]he question of what constitutes an essential service is a factual one" (*see Matter of Stratford Leasing Corp. v Gabel*, 17 AD2d 332, 333 [1st Dept 1962], *affd* 13 NY2d 607 [1963] [discussing essential services in an Article 78 proceeding]). Heat, running water and hot water are generally considered essential services for purposes of Administrative Code § 27-2004 (a) (48) (*see Cartagena v Rhodes 2, LLC*, 2020 NY Slip Op 30290[U], *10 [Sup Ct, NY County 2020]; *Hucey v Frezza*, 70 Misc 3d 1222[A], 2021 NY Slip Op 50186[U], *10 [Civ Ct,

Kings County 2021]). The conditions plaintiff complained of – water damage, defective windows and a rodent infestation – do not qualify as an essential services. Although plaintiff avers that she moved in Housing Court for an order requiring the HDFC to perform repairs (NYSCEF Doc No. 366, ¶ 22), she has not submitted a copy of that order. The only language related to repairs in the record presented on this motion appears in the stipulation of settlement in the 2013 Action. The stipulation discussed a door gap, a light fixture, and a slanted hallway floor (NYSCEF Doc No. 359 at 48). Such conditions are not considered essential services.

However, under the catch-all provision in Administrative Code § 27-2004 (a) (48) (g), a repeated failure to make repairs can constitute harassment (*Martinez v Ling*, 70 Misc 3d 1211[A], 2021 NY Slip Op 50048[U], *2 [Civ Ct, Queens County 2021]; *Dani Lake LLC v Torres*, 64 Misc 3d 1231[A], 2019 NY Slip Op 51383[U], *9 [Civ Ct, NY County 2019]), particularly when the conditions substantially interfere with or disturb a tenant's comfort, repose, peace or quiet. This section of the Administrative Code states that harassment shall include "other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy." Here, plaintiff avers in a conclusory fashion that the HDFC disregarded her requests for repairs stemming from water damage from the roof and the parapet wall, which caused physical damage to the apartment and aggravated her breathing issues (NYSCEF Doc No. 366, ¶ 41).

While the Co-op Defendants acknowledge that plaintiff reported conditions in her apartment to the New York City Department of Buildings (DOB) and that DOB issued six violations, they claim that plaintiff refused to permit FMC to perform repairs, which led FMC to seek assistance from HPD (*id.*, ¶¶ 43-44 and at 151-152). In support of their contention that plaintiff refused to provide access for them to perform repairs, the Co-op Defendants annex to

their papers correspondence to plaintiff detailing their attempts to gain access and plaintiff denials of access (*id.*). Plaintiff has not presented any evidence to contradict the Co-op Defendants' evidence that she failed to provide access. A tenant who complains about conditions and then refuses to allow the landlord to make repairs is not entitled to rent abatement under a claim that the landlord breached the warranty of habitability (*Brookwood Mgt. Co. v Melius*, 14 Misc 3d 137 [A] [App T, 2nd Dept 2007]) or damages under a claim that the landlord breached a substantial provision of their lease (*Leschins v 3777 Independence Corp.*, 2009 NY Misc LEXIS 2564 [SC Bx Co 2009]). Likewise, as here under the equitable principle that no one is permitted to profit by their own wrongdoing (*Matter of Covert*, 97 NY2d 68, 74 [2001]) plaintiff is not entitled to recover under her harassment claim for failure to make repairs because the evidence establishes that she failed to provide the HDFC with access to her apartment for the HDFC to perform the repairs. Accordingly, plaintiff's second cause of action will be dismissed.

In her third cause of action plaintiff alleges that the HDFC discouraged the Marshal from complying with the March 17, 2014 and April 24, 2014 Housing Court orders' requirement that the Marshal contact APS before scheduling an eviction. Plaintiff claims she contacted APS and was told that the Marshal had called them and told them that plaintiff was "alright" (NYSCEF Doc No 366 ¶ 25). While this proffer of what the Marshall allegedly said to APS is inadmissible double hearsay (*see Jimenez v 470 Audubon Ave. Corp.*, 239 AD2d 106, 107 [1st Dept 1997]), even if true, the issuance of a warrant of eviction defeats plaintiff's unlawful eviction claim under Administrative Code § 26-521 (*Campbell v Maslin*, 91 AD2d 559, 560 [1st Dept 1982], *affd* 59 NY2d 722 [1983]). Moreover, plaintiff's interpretation of the Marshal's actions, if true, as violating the Housing Court's orders is without merit because the Housing Court orders merely directed the Marshal to contact APS before scheduling an eviction and according to

plaintiff, the Marshal did just that. Plaintiff takes issue with what the Marshal purportedly said to APS but there was no restriction on what the Marshal could communicate to APS. Indeed, plaintiff's affidavit is silent as to any actions on the part of the HDFC with respect to APS or the Marshal and "[g]enerally, a landlord is not responsible for the manner in which an officer executes a valid process duly issued . . . the officer only becomes his agent [of the landlord] where the process is irregular, unauthorized or void" (*Cla-Mil East Holding Corp. v Medallion funding Corp.*, 16 AD3d 194 [1st Dept 2005]). Since the Marshal was acting upon a validly issued warrant of eviction, the HDFC is not responsible for what the Marshal may have said to APS and the manner in which the warrant was executed. Accordingly, plaintiff's third cause of action will be dismissed.

B. The Sixth and Seventh Causes of Action for Prima Facie Tort

The sixth and seventh causes of action for prima facie tort against the HDFC and Maschio, respectively, allege that the Co-op Defendants interfered with the disbursement of the FEPS grant and encouraged Carver to take possession of plaintiff's stock.

The elements for a cause of action for prima facie tort are: "(1) the intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal" (*AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 403 [1st Dept 2014]). The plaintiff must plead and prove that the defendant's "purportedly tortious conduct was motivated by an otherwise lawful act performed with the intent to injure or with a 'disinterested malevolence'" (*Princes Point, LLC v. AKRF Eng'g, P.C.*, 94 AD3d 588, 589 [1st Dept 2012], quoting *Curiano v Suozzi*, 63 NY2d 113, 117 [1984]). Disinterested malevolence has been described as act that "must be a malicious one unmixed with any other and exclusively directed to injury and damage of another" (*Burns Jackson Miller*

Summit & Spitzer v Lindner, 59 NY2d 314, 333 [1983], quoting *Beardsley v Kilmer*, 236 NY 80, 90 [1923]).

Applying these precepts, the Co-op Defendants have demonstrated that malevolence or disinterested malevolence was not the sole motive for their informing DSS of plaintiff's excess resources (*see Hakim v James*, 169 AD3d 450, 452 [1st Dept 2019]). Maschio avers that he sought to correct statements plaintiff (or her counsel) had made to show that she owned other property outside of New York and lived alone in the apartment. Significantly, plaintiff has not disputed that she owns the Reading property or that her granddaughter did not live with her after 2013. Apart from her conclusory statement that she believes the Co-op Defendants had acted maliciously (NYSCEF Doc No. 366, ¶ 20), she has presented no evidence of malevolence as a motive. Additionally, plaintiff alleges that Maschio contacted Carver and told it to "call in the mortgage loan" (*id.*, ¶ 19), but she offers no details of when the conversation took place. In any event, Carver did not need any encouragement to foreclose on the loan since plaintiff admitted that she was already in default.

A plaintiff pursuing a cause of action for prima facie tort must also demonstrate that he or she sustained special damages, i.e. a "specific and measurable loss" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 143 [1985]). Special damages must go "beyond the physical, psychological, or financial demands of defending a lawsuit" (*Del Vecchio v Nelson*, 300 AD2d 277, 278 [2d Dept 2002]). In this action, the Co-op Defendants have demonstrated that plaintiff did not particularize or itemize her special damages (*see Ivan Mogull Music Corp. v Madison-59th Street Corp.*, 162 AD2d 336, 337 [1st Dept 1990]; *Armory Bldg. Ltd. Partnership v Park 25th Assoc.*, 120 AD2d 438, 441 [1st Dept 1986]). Plaintiff's contention that she sustained increased legal fees, late fees and other invalid fees sounds more in the nature of general damages, not special

damages (*see Leather Dev. Corp. v. Dun & Bradstreet*, 15 AD2d 761, 761 [1st Dept 1962], *appeal dismissed* 12 NY2d 668 [1962], *affd* 12 NY2d 909 [1963]). Accordingly, plaintiff's sixth and seventh causes of action will be dismissed.

C. The Eighth Cause of Action for Breach of Fiduciary Duty

The eighth cause of action pleads a breach of fiduciary duty against the HDFC. "[T]o state a claim for breach of fiduciary duty, a plaintiff must allege a fiduciary relationship, misconduct by the other party, and damages caused by the party's misconduct" (*Kasowitz Benson Torres LLP v Cabrera*, 188 AD3d 602, 603 [1st Dept 2020]). Since "[a] corporation does not owe fiduciary duties to its members or shareholders" (*Hyman v New York Stock Exch., Inc.*, 46 AD3d 335, 337 [1st Dept 2007]), the Co-op Defendants have established that the eighth cause of action must be dismissed (*see Stalker v Stewart Tenants Corp.*, 93 AD3d 550, 552 [1st Dept 2012] [dismissing a cause of action for breach of fiduciary duty pled against the defendant corporation]; *Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009] [same]; *cf. Demas v 325 W. End Ave. Corp.*, 127 AD2d 476, 478 [1st Dept 1987]). Plaintiff fails to raise a triable issue of fact in opposition. Accordingly, plaintiff's eighth cause of action will be dismissed.

D. The Ninth Cause of Action for Breach of the Regulatory Agreement

The ninth cause of action alleges that the HDFC breached the Regulatory Agreement with respect to the maintenance and operation of the Building.

To prevail on a cause of action for breach of contract, a plaintiff must prove the existence of a contract, the plaintiff's performance, the defendant's breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The Co-op Defendants have stablished that plaintiff is not a signatory to the Regulatory Agreement, and, therefore, she lacks

standing to pursue the claim. Plaintiff has not addressed the issue of standing in her opposition. Accordingly, plaintiff's the ninth cause of action will be dismissed.

E. The Tenth Cause of Action for Breach of the Proprietary Lease

Plaintiff's tenth cause of action alleges that the HDFC breached the Proprietary Lease by commencing the 2015 Action seeking legal fees to which they are not entitled.

Section 6.01 (c) of the Proprietary Lease permits the HDFC to collect legal fees as additional maintenance in the event a shareholder or lessee defaults on a condition in the Proprietary Lease. As with the cause of action for breach of the Regulatory Agreement, the Co-op Defendants have shown that plaintiff lacks standing to pursue this claim because she was no longer a shareholder or lessee when the 2015 Action was commenced. Carver had acquired plaintiff's shares and her interest in the Proprietary Lease at the public auction in June 2014. Thus, she lacks standing to pursue a claim for a breach of the Proprietary Lease. In opposition, plaintiff fails to address the issue of standing and instead focuses on the Co-op Defendants' own breach of the Proprietary Lease, therefore plaintiff fails to raise a triable issue of fact. Accordingly, plaintiff's the tenth cause of action will be dismissed.

F. The Eleventh Cause of Action for Abuse of Process

The cause of action for abuse of process is predicated upon the HDFC and the Lender Defendants acting in concert with one another or on their own to issue process against plaintiff without justification.

A cause of action for abuse of process requires "unlawful interference with one's person or property under color of process" (*Williams v Williams*, 23 NY2d 592, 596 [1969]). Stated another way, "abuse of process may be defined as the misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process" (*Board of Educ. of*

Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO, 38 NY2d 397, 400 [1975]). The three elements to sustain the claim are: "(1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano*, 63 NY2d at 116).

At the outset, plaintiff failed to address this cause of action in her opposition. By failing to oppose this branch of the motion, plaintiff has abandoned the abuse of process claim (*see Ng*, 157 AD3d at 550). In any event, the Co-Op Defendants have met their prima facie burden on this cause of action. Plaintiff's assertion that THE THE HDFC brought the non-payment proceedings as part of a scheme to harass her amounts to nothing more than a complaint about an improper purpose, which is insufficient (*see Goldman v Citicore I, LLC*, 149 AD3d 1042, 1045 [2d Dept 2017]). Indeed, "[a] malicious motive in commencing an action is insufficient to support such a claim because 'the institution of a civil action by summons and complaint is not legally considered process capable of being abused'" (*Syllman v Nissan*, 18 AD3d 221, 222 [1st Dept 2005)] [internal citation omitted]).

Moreover, abuse of process requires "'the improper use of process after it is issued'" (*Curiano*, 63 NY2d at 117 [internal citation omitted]). Here, plaintiff disputes the merits of each Housing Court proceeding, but she does not dispute that each proceeding stemmed from her admitted failure to pay maintenance when due. Importantly, plaintiff has acknowledged that she was in arrears before THE THE HDFC brought the 2013 Action. Likewise, she has not demonstrated that she and Carver were current on the maintenance charges before THE THE HDFC brought the 2015 Action. Consequently, the Co-op Defendants have demonstrated that

process was not used to obtain an improper collateral advantage (*see I.G. Second Generation Partners, L.P. v Duane Reade*, 17 AD3d 206, 207 [1st Dept 2005]).

Lastly, the court (Wright, J.) previously concluded that "there was no abuse of process" by the Lender Defendants because the "[Housing Court] proceedings were not dismissed, and eventually led to an admission of arrears and eventually a judgment of possession" (NYSCEF Doc No. 121 at 3). This part of the decision was affirmed on appeal (*see Arthur*, 150 AD3d at 448). Accordingly, plaintiff's eleventh cause of action will be dismissed as against the HDFC.

G. The First Counterclaim for Breach of the Proprietary Lease

The Co-op Defendants allege that plaintiff breached Section 5.05 (c) (iii) of the Proprietary Lease when she pledged her shares and interest in the Proprietary Lease as collateral for the home equity loan she obtained from Carver.

As an initial matter, plaintiff's argument that the Co-op Defendants neglected to tender a copy of the Proprietary Lease lacks merit, since the document is attached to the amended complaint (NYSCEF Doc No. 357 at 60-90).

With regard to the merits, the Co-op Defendants have not demonstrated their entitlement to summary judgment. It is well settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Ambiguous terms in a contract must be strictly construed against the drafter (*see Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454, 460 [1989]). Here, an ambiguity exists as to what constitutes the "Resale Period." As stated above, Section 5.05 (c) (iii) bars a shareholder from pledging or assigning his or her shares as security for a home equity loan during the Resale Period, and Section 5.05 (c) (i) refers to Section 2.01 for the definition of Resale Period. Section 2.01, though, does not define the term

Resale Period. Instead, that provision states that the Building is encumbered for 30 years and defines this 30-year period as the "Restriction Period" (NYSCEF Doc No. 368 at 4). The clause further provides that "[d]uring the resale period the prior written approval of … HPD must be obtained before the building can be sold or mortgaged. In addition, the Shares to which this lease pertains are subject to a lien by [the HDFC]" (*id.*). It is unclear whether the terms Restriction Period and Resale Period may be used interchangeably since the latter is not separately defined. Accordingly, that part of the motion seeking summary judgment on the first counterclaim will be denied.

G. The Second Counterclaim for Reasonable Attorney's Fees

The second counterclaim is for reasonable attorneys' fees of not less than $50,000 under Section 6.01 (c) of the Proprietary Lease.

As explained above, Section 6.01 (c) permits the HDFC to recover its reasonable attorneys' fees in the event it has to defend or assert a counterclaim in an action brought by a lessee. The Co-op Defendants have established that the HDFC is entitled to its reasonable attorneys' fees predicated on its defense of plaintiff's claims since plaintiff's claims against the HDFC will be dismissed. However, the HDFC has not established it is entitled to attorneys' fees on its first counter claim since summary judgment on the first counter claims will be denied. Accordingly, the HDFC is granted summary judgment on its claim for attorneys' fees predicated on its defense against plaintiff's claims against it and the HDFC is denied summary judgment on its claim for attorneys' fees predicated on the HDFC's first counter claim.

H. The Third Counterclaim for Sanctions for Frivolous Litigation

The third counterclaim seeks monetary sanctions for frivolous litigation under Uniform Rules for Trial Courts (22 NYCRR) § 130-1.1 (a). The rule permits the court, in its discretion, to

impose monetary sanctions on a party as the result of that party's frivolous conduct. Conduct is considered "frivolous" where:

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false.
>
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party."

(Uniform Rules for Trial Cts [22 NYCRR] § 130-1.1 [c]).

There is no independent cause of action for a violation of Uniform Rules for Trial Courts (22 NYCRR) § 130-1.1 (*see Cerciello v Admiral Ins. Brokerage Corp.*, 90 AD3d 967, 968 [2d Dept 2011] [collecting cases]). As a consequence, it is improper to assert a violation of the rule as a counterclaim. Accordingly, summary judgment on the third counterclaim will be denied and the third counter claim will be dismissed.

I. Lifting the Stay of Eviction Proceedings

In light of the dismissal of all of plaintiff's claims against the Co-op Defendants, the order dated July 28, 2017 enjoining plaintiff's eviction will be vacated.

The Lender Defendants' and Plaintiff's Summary Judgement Motions (MS Nos. 12 & 13)

A. The Twelfth Cause of Action

Plaintiff's twelfth cause of action seeks a judgment declaring that Carver failed to send plaintiff a 90-day pre-foreclosure or pre-disposition notice as required by UCC 9-611 (f).

It is well settled that "where the pledged security for a loan consists of the shares of a cooperative apartment and its proprietary lease, it is the procedures for enforcement of a security interest set forth in UCC article 9 which apply, rather than the procedures set forth in RPAPL article 13 for the enforcement of a security interest in real property" (*Matter of Chase v Wells Fargo Bank, N.A.*, 135 AD3d 751, 753 [2d Dept 2016]). Thus, a secured party seeking to dispose of shares in cooperative apartment and a proprietary lease after a default must furnish the debtor with a "reasonable authenticated notification of disposition" (UCC 9-611 [b] and [c]). Significantly, UCC 9-611 (f), entitled "Additional pre-disposition notice for cooperative interests," states, in relevant part:

> "(1) In addition to such other notification as may be required pursuant to subsection (b) of this section and section 9-613 of this article, a secured party whose collateral consists of a residential cooperative interest used by the debtor and whose security interest in such collateral secures an obligation incurred in connection with financing or refinancing of the acquisition of such cooperative interest and who proposes to dispose of such collateral after a default with respect to such obligation, shall send to the debtor, not less than ninety days prior to the date of the disposition of the cooperative interest, an additional pre-disposition notice as provided herein.
> (2) The notice required by this subsection shall be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the notice required by subsection (b) of this section, and the title of the notice shall be in bold, twenty-point type. The notice shall be on its own page"

The statute details specific language the notice must contain (*see* UCC 9-611 [f] [3]). This notice requirement is also considered a condition precedent to a non-judicial foreclosure of a cooperative apartment (*see Stern-Obstfeld v Bank of Am.*, 30 Misc 3d 901, 906 [Sup Ct, NY County 2011] [likening the notice requirement in UCC 9-611 to the notice requirement in RPAPL 1304]; *Waithe v Citigroup, Inc.*, 42 Misc 3d 1205[A], 2013 NY Slip Op 52206[U], *5 [Sup Ct, Kings County 2013]). The burden rests with the secured party to demonstrate

compliance (*see Stern-Obstfeld v Nationstar Mtge. LLC*, 2020 NY Slip Op 32790[U], *17 [Sup Ct, NY County 2020]).

Generally, proof of proper mailing may be used to support a presumption of receipt (*see Unitrin Advantage Ins. Co. v Cohen & Kramer M.D., P.C.*, 188 AD3d 511, 512 [1st Dept 2020]). Such proof may consist of an "affidavit of service, actual proof of mailing, or a description of … 'standard office practice or procedure designed to ensure that items are properly addressed and mailed'" (*DeLuca v Smith*, 146 AD3d 732, 732 [1st Dept 2017] [internal citation omitted]); *Chase v Wells Fargo Bank, N.A.*, 175 AD3d 1480, 1481 [2d Dept 2019], *lv denied* 35 NY3d 903 [2020] [concluding that the defendant bank demonstrated its compliance with UCC 9-611 with an affidavit from someone who reviewed the loan documents, had personal knowledge of the business' mailing practices and procedures, and stated that the notice complied with the statute]). Once a proper mailing has been established, a mere denial of receipt is insufficient to rebut the presumption that a proper mailing occurred (*see Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]).

Here, the Lender Defendants fail to furnish adequate proof that a proper mailing of the 90-Day Notice occurred. The Lender Defendants proffer an affidavit from Burris and an affirmation from Golab.[3] Burris states that his duties at DMI include reviewing its computerized systems and the records made in the ordinary course of its business (NYSCEF Doc No. 395, ¶ 3). He avers that the documents attached to his affidavit, such as the 90-Day Notice, are true and accurate copies of documents "sent by DMI, in the manner indicated on the individual documents" (*id.*, ¶ 3). Golab affirms that his duties as the Litigation Managing Attorney at McCabe as counsel to Carver and REO include reviewing McCabe's computerized systems and

[3] The Lender Defendants also submit the affirmation of McCabe attorney Kiyam J. Poulson (Poulson) (NYSCEF Doc No. 397, Kaufman affirmation, exhibit E), which was submitted previously on motion sequence no. 1 in this action. The affirmation lacks probative value since Poulson has not demonstrated that he has personal knowledge of the facts at issue.

records made in its ordinary course of business (NYSCEF Doc No. 398, ¶¶ 1-2). Golab states that the documents attached to his affirmation, such as the Notice of Sale, are true and accurate copies of the documents contained in McCabe's files (*id.*, ¶¶ 3 and 6). However, neither Burris nor Golab describe the standard office procedures by which the 90-Day Notice was mailed (*see Matter of O'Farrel v Caliber Home Loans*, 189 AD3d 413, 414 [1st Dept 2020]), nor did they attest to their personal knowledge that the mailing had occurred (*see JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513, 1518 [2d Dept 2019]; *CitiMortgage, Inc. v Moran*, 167 AD3d 461, 461 [1st Dept 2018]). Both confirmed they reviewed their employer's business records, but such statements are insufficient to establish that the notice was actually mailed (*see Bear Stern Asset-Backed Sec. I Trust 2006-IMI v Ceesay*, 180 AD3d 504, 504 [1st Dept 2020]). Thus, the Lender Defendants have not furnished adequate proof of proper mailing such that the presumption of receipt arises (*see Matter of O'Farrel*, 189 AD3d at 413).

The Lender Defendants' reliance on *DeRosa v Chase Manhattan Mtge. Corp.* (10 AD3d 317, 321 [1st Dept 2004], *rearg denied* 2005 NY App Div LEXIS 1578 [1st Dept 2005], *rearg denied, sanctions denied* 2005 NY App Div LEXIS 4022 [1st Dept 2005]), for the proposition that they need only show they took "reasonable steps to provide notice" of the foreclosure to plaintiff is unavailing. The plaintiff in *DeRosa* claimed that he did not receive the notices of default and sale which the defendant had sent by regular and certified mail (*id.* at 318). The notices had misidentified the apartment number and zip code, and the published notice of sale misstated the year for the sale (*id.*). The Court declined to set aside the sale, in part, because the defendant had established that, despite these errors, a doorman at the plaintiff's building had signed for the notification letters (*id.* at 321). By contrast, the Lender Defendants have not produced comparable evidence of receipt. And while a secured party need not give a debtor

actual notice of the disposition (*see Thornton v Citibank, N.A.*, 226 AD2d 162, 162 [1st Dept 1996], *lv denied* 89 NY2d 805 [1996], *rearg denied* 89 NY2d 1031 [1997]), a secured party must still comply with the notice requirement set forth in UCC 9-611 (f), which states that a "secured party … *shall* send [notice] to the debtor" (emphasis added). Therefore, that part of the Lender Defendants' motion for summary judgment on plaintiff's twelfth cause of action will be denied (*see Poupart v Federal Natl. Mtge. Assn.*, 2018 NY Slip Op 33269[U], *4 [Sup Ct, NY County 2018] [denying a motion to dismiss where the defendant failed to demonstrate its compliance with the notice provisions in UCC 9-611]).

The part of plaintiff's motion for summary judgment in her favor on the twelfth cause of action will also be denied. Her argument that the Lender Defendants cannot demonstrate their compliance with UCC 9-611 (f) merely points to gaps in the Lender Defendants' proof, which is insufficient to meet her affirmative burden on summary judgment (*see US Bank N.A. v Bamba*, 189 AD3d 1116, 1117 [2d Dept 2020]; *Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909 [2d Dept 2013], *lv dismissed* 21 NY3d 1068 [2013]). Furthermore, while plaintiff averrs that she never received the 90-Day Notice (NYSCEF Doc No. 366, plaintiff 11/22/15 aff, ¶ 77), she readily admits she received other correspondence about her loan (*id.*, ¶¶ 51-52, 71-72, and 75). The Lender Defendants should be afforded an opportunity at trial "to furnish additional proof, if such exists, that a proper mailing took place" (*Matter of Lumbermens Mut. Cas. Co. (Collins)*, 135 AD2d 373, 375 [1st Dept 1987]).

Accordingly, the Lender Defendants and plaintiff's motions for summary judgment on plaintiff's twelfth cause of action will be denied.

B. The Thirteenth Cause of Action

Plaintiff's thirteenth cause of action asserts that the Lender Defendants failed to furnish

her with notice of the sale in violation of UCC 9-613.

UCC 9-613 discusses the content and form of a notification of disposition of collateral in non-consumer goods transactions and states, in relevant part, that:

> "(a) The contents of a notification of disposition are sufficient if the notification:
> (1) describes the debtor and the secured party;
> (2) describes the collateral that is the subject of the intended disposition;
> (3) states the method of intended disposition;
> (4) states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and
> (5) states the time and place of a public disposition or the time after which any other disposition is to be made."

Here, the Lender Defendants contend they adhered to the statute by sending plaintiff the Notice of Sale by first class mail and certified mail, return receipt requested (NYSCEF Doc No. 398 at 15-17 and 23), but, as discussed above, the Lender Defendants failed to proffer adequate proof of proper mailing.

Furthermore, the Lender Defendants failed to demonstrate that the contents of the Notice of Sale satisfied UCC 9-613 (a) (1) and (4). While UCC 9-613 (d) provides that "[a] particular phrasing of the notification is not required," the Lender Defendants have not shown that the contents of the notice substantially comply with the statute (*see Moed v Apple Bank for Sav.*, 2016 WL 363185, *1, 2016 NY Misc LEXIS 5897, *3 [Sup Ct, NY County 2016]). First, the notice misidentifies the secured party. The Notice of Sale names "Caver [sic] Federal Savings Bank" as the holder of the security (NYSCEF Doc No. 381 at 1). Carver, though, had sold the Note and the Security Agreement to Waterfall Fund two months earlier, and Carver had written to plaintiff to inform her of the change in ownership (NYSCEF Doc No. 387, ¶ 11), although the letter failed to disclose the name of new Note holder (NYSCEF Doc No. 377 at 1). UCC 9-613

(c) provides that the contents of the notice may be sufficient even if it contains "minor errors that are not seriously misleading," but the misidentification of the secured party is not a minor error. Moreover, the Notice of Sale does not state that plaintiff is entitled to an accounting of the unpaid indebtedness or reference the availability of an accounting. Furthermore, UCC 9-613 (b) provides that "[w]hether the contents of a notification that lacks any of the information specified in subsection (a) are nevertheless sufficient is a question of fact." As such, whether the Notice of Sale was sufficient for purposes of UCC 9-613 cannot be resolved on this motion. Accordingly, summary judgment on the thirteenth cause of action is denied to plaintiff and the Lender Defendants.

C. Fifteenth Cause of Action

Plaintiff's fifteenth cause of action alleges that the Lender Defendants engaged in deceptive practices in violation of General Business Law § 349.

General Business Law § 349 (a) prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." The statute provides that "any person who has been injured by reason of any violation of this section may bring an action in his [or her] own name to enjoin such unlawful act or practice, an action to recover his [or her] actual damages" (General Business Law § 349 [h]). To state a cause of action under General Business Law § 349, "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (*City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]; *accord Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20, 26 [1995]).). The statute does not apply to private disputes (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 321 [1995]).

Key to a claim brought under General Business Law § 349 is whether the conduct complained of has "a broader impact on consumers at large" (*see Oswego*, 85 NY2d at 25). Here, the Lender Defendants have demonstrated that plaintiff's complaints largely concern a private dispute that has no impact on the public at large (*see Sutton Apts. Corp. v Bradhurst 100 Dev. LLC*, 107 AD3d 646, 648 [1st Dept 2013] [reasoning that the alleged violation concerned only the parties in the "condop" building]; *Merin v Precinct Devs. LLC*, 74 AD3d 688 [1st Dept 2010] [finding that the parties' private contractual dispute did not implicate General Business Law § 349]). Importantly, plaintiff complains that the Lender Defendants induced her into believing that she had qualified for a payment plan, sent her correspondence failing to notify her of her rights under the Uniform Commercial Code, and auctioned off her shares and her interest in the Proprietary Lease without the protections afforded to her by law. Such claims are specific to her and have no broader impact on the public. Plaintiff, in opposition, fails to establish how the Lender Defendants' conduct affected the public at large, and fails to demonstrate her entitlement to summary judgment on this claim, as well.

Accordingly, the Lender Defendants' motion for summary judgment dismissing plaintiff's fifteenth cause of action will be granted and the fifteenth cause of action will be dismissed and plaintiff's motion for summary judgment on this cause of action will be denied.

Accordingly, it is

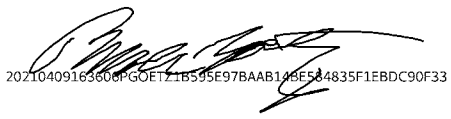
ORDERED that the branch of the motion of defendants 1809-15 7th Avenue Housing Development Fund Corporation and Michael Maschio for summary judgment dismissing the complaint (motion sequence no. 11) is granted and the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action are dismissed; and it is further

ORDERED that the branch of the motion of defendants 1809-15 7th Avenue Housing Development Fund Corporation and Michael Maschio for summary judgment on their three counterclaims (motion sequence no. 11) is denied as to the first and third counterclaims and granted as to the second counterclaim solely to the extent for attorneys' fees predicated on defense of plaintiff's claims against these defendants; and it is further

ORDERED that the branch of the motion of defendants 1809-15 7th Avenue Housing Development Fund Corporation and Michael Maschio to lift the stay of eviction (motion sequence no. 11) is granted and the July 8, 2017 order enjoining the Co-op Defendants from evicting plaintiff is vacated; and it is further

ORDERED that the motion of defendants Carver Federal Savings Bank, Waterfall Victoria Master Fund Ltd., Waterfall Victoria REO 2013-01, LLC, and Statebridge Company, LLC for summary judgment dismissing the complaint (motion sequence no. 12) is granted to the extent of dismissing the fifteenth cause of action, and the motion is otherwise denied; and it is further

ORDERED that the motion of plaintiff Nora Arthur for summary judgment against defendants Carver Federal Savings Bank, Waterfall Victoria Master Fund Ltd., Waterfall Victoria REO 2013-01, LLC, and Statebridge Company, LLC (motion sequence no. 13) is denied.



4/9/2021
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE